

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 17, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. SE 2008-994-M
Complainant	:	A.C. No. 40-00811-160277
	:	
	:	Docket No. SE 2010-785-M
v.	:	A.C. No. 40-00811-219691
	:	
	:	Mine: Sangravl Company, Inc.
SANGRAVL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mr. John B. Herbert, representing Sangravl Company, Inc.

Schean G. Belton, Esq., U.S. Department of Labor, Nashville, TN on behalf of
the Secretary

Before: Judge David F. Barbour

These cases are before me on a Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Sangravl Company, Inc. (“Sangravl”), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or “Act”), 30 U.S.C. §815. The Secretary seeks the assessment of penalties totaling \$18,908 for eight alleged violations of mandatory safety standards set forth in 30 C.F.R. Part 56.¹ The violations are alleged in six citations issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), one citation issued pursuant to section 104(d)(1) of the Act, 30 U.S.C. §814(d)(1), and one order issued pursuant to section 104(d)(1). *Id.* The citations and order involve conditions cited at Sangravl’s Humphreys County, Tennessee sand and gravel processing facility. The Secretary asserts that all of the alleged violations were significant and substantial contributions to mine safety hazards (“S&S” violations). She further asserts that two were the result of the company’s unwarrantable failure to comply with the cited standards.

In answering the Secretary’s petition the company argues that the Secretary’s S&S allegations and other assertions of gravity do not take account of the lack of employee exposure

¹ Part 56 contains standards applicable to the nation’s surface metal and nonmetal mines.

to the alleged conditions. The company also argues that the Secretary's negligence assertions are inaccurate.

The matter was heard in Nashville, Tennessee. The Secretary was represented by counsel. The company was represented by its president.

STIPULATIONS

The parties agreed that Sangravl's facility is subject to the jurisdiction of the Act and that Sangravl is a small operator.² Tr. 10; *See also* Tr. 130.

THE EVIDENCE

THE MINE AND THE INSPECTION OF JUNE 23, 2008

Edward ("Ed") Jewell is a federal mine inspector. Prior to becoming an inspector Jewell worked in the mining industry as a general laborer, an electrician, a mechanic, a supervisor and a company safety director. Tr. 14-15. In June 2008, he conducted two inspections at Sangravl's mine. Tr. 15. At the facility sand and gravel is off-loaded from barges, screened and hauled to stockpiles. Tr. 15. Customers drive their haul trucks onto miner property where the resulting product is loaded onto the trucks. Tr. 15-16.

DOCKET NO. SE 2008-994

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
7752045	6/23/08	56.16006

The citation states:

The valve of the oxygen cylinder on the portable welding/cutting unit is not protected against damage or contact. The valve of the cylinder is fully exposed. The unprotected cylinder valve is located just outside of the mine's office. Equipment traffic is observed in the area. A front end loader is parked near the cylinder. This condition creates a hazard of the valve

² John Herbert, the company's president, explained that the company employs seven persons: himself, his son, four miners, and a mine office worker. All of the employees work at the mine site. *See* Tr. 63-64, 138.

being knocked off and striking an employee
with a propelled object.

Gov't. Ex. 1

On the morning of June 23, 2008, Jewell arrived at the mine and promptly began the inspection. One of the first things Jewell saw was an oxygen cylinder that was missing a cover for the cylinder's valve. Because the valve was fully exposed, Jewell believed the cylinder was in violation of 30 C.F.R. §56.16006. Tr. 16. The cylinder was located just outside the mine's shop. Tr. 17. According to Jewell, the supervisor's office was within 10 to 12 feet of the cylinder. *Id.* The cylinder was secured to a portable cart with a chain. Tr. 50. Jewell also noted that a front end loader recently was operating in the vicinity. Tr. 17.

Jewell believed the combination of circumstances made the cylinder "very dangerous." Tr. 17. If the valve stem was damaged, a sudden, uncontrolled release of gas could turn the cylinder into an erratic missile. *Id.* Jewell testified that such an accident could happen if the cart was struck and overturned by equipment operating near it. Tr. 50-51. Jewell photographed the cylinder. The photograph shows the cylinder's exposed valve, as well as the gauges on the cylinder. Gov't Ex. 2. According to Jewell, the gauges indicate the cylinder was approximately 60 percent full. Tr. 18.

Jewell described the area where the cylinder was located as "highly trafficked." Tr. 19. A parking area was located approximately 15 feet across the road from the cylinder, and the cart and cylinder were adjacent to the open door of the shop. Tr. 19. In Jewell's opinion, the easy access of equipment and people to the cylinder made an accident "reasonably likely" as mining continued. *Id.* He believed the cylinder's valve would be damaged and a miner would be struck by the resulting uncontrolled and uncontrollable cylinder-projectile. A fatality would result. Tr. 18.

Because the cylinder's missing valve cover was visually obvious and the cylinder was located near Herbert's office, Jewell thought that the condition was caused by the company's "high" negligence. Tr. 20. Although it was clear to Jewell that the cylinder had been used and the cap had not been replaced, he did not know how long the valve was exposed and unprotected. Tr. 20, 51.

John Herbert pointed out that the cylinder and the cart were next to a building and he thought it unlikely a large piece of equipment would come close enough to the building to knock over the cart and damage the valve. Tr. 65. Herbert also maintained that with only six miners working outside at the mine (Herbert, his son and four others) there was little "traffic" in the area. Tr. 64.

After the citation was issued, the condition was almost immediately corrected by covering the cylinder's valve. Tr. 20; Gov't. Ex. 3.

THE VIOLATION

The language of the standard is clear. In pertinent part section 56.16006 requires valves on compressed gas cylinders to “be protected by covers when being transported or stored.” Both Jewell and Herbert agreed that the cylinder was stored and that its valve was not protected by a cover. The violation existed as charged.

S&S AND GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Further, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept., 1996).

Here, the Secretary established the violation. She also proved that the cylinder’s unprotected valve created a safety hazard that endangered miners. The inspector’s testimony that the cylinder could become an uncontrolled projectile if the valve was damaged and that miners worked and traveled in the area makes it clear that the violation endangered miners. It also is clear that if a miner was struck by an airborne cylinder the miner would be seriously, even fatally injured.

The question is whether the Secretary established the third element of the *Mathies* test, and I conclude that she did. The fact that equipment operated in the vicinity of the cart on which the cylinder was secured and the fact that miners worked and traveled in the area meant that as mining continued, it was reasonably likely a loader or other equipment would hit and upset the cart, that the valve would be damaged and the compressed oxygen would be released in an uncontrolled fashion and the cylinder would be projected into the area. Although Herbert maintained equipment did not come close enough to the building to hit the cart (Tr. 65), the history of the Mine Act repeatedly shows that heavy mobile equipment does not always travel where it is supposed to operate. Moreover, the nearby parking area meant such equipment either was present in the area or would be present as mining continued. Further, the cart was mobile and as mining continued it would presumably be moved to other areas as required and be subjected to the same and possibly to an increased danger of overturning. Given all of this, I conclude the violation was S&S.

The violation also was serious. As noted, if the cylinder became a projectile, it would subject miners to the hazard of a potentially fatal injury.

NEGLIGENCE

Jewell found that the violation was due to Sangravl's high negligence and I agree. Tr. 20; Gov't Ex. 1. The lack of a cover was visually obvious. The oxygen cylinder and cart were in an area where they could easily be seen. Miners worked and traveled in the area, which meant that either Herbert or his son, both of whom acted in a managerial capacity, had occasion to be in the area too. The hazard created by the violation reasonably could be expected to cause a fatal injury. The danger of the violation meant that management had a high standard of care. The company fell short of this standard, and I therefore find that it was highly negligent.

CITATION NO.
7752046

DATE
6/23/08

30 C.F.R. §
56.12030

The citation states in part:

A potentially dangerous condition is observed on the . . . portable welder. The positive and negative conductors of the welder are not protected at the connection point against employee contact. The connection points of the conductors are bare and fully exposed to contact. The bare connection points are six inches above ground level. The bare connection points are within one foot of the stop/start switch on the welder. The welder is normally used for outside repair work. The welder is located just outside the mine office. This condition creates an

electrical shock/burn hazard.

Gov't. Ex. 4.

Shortly after observing that the cap was missing on the oxygen cylinder, Jewell noticed a welder located just outside the shop. The connection points of the welder's positive and negative conductors were located close to the equipment's stop and start switch. Tr. 23. The connection points were bare. *Id.* They were not protected against accidental or inadvertent contact. The welder was used regularly to perform maintenance and repair work. Tr. 22-23.

In Jewell's opinion the condition created an electrical shock hazard to miners walking by the welder and to those doing repair work with the welder and turning it on and off. Tr. 23. The connection points and the control switch were located near the front of the welder. Tr. 52. A miner using the welder had to stand adjacent to the connection points. A miner turning the welder on and off or adjusting the welder had to access the on and off switch with his hand. The switch was adjacent to the connection points. Tr. 51-52. If a miner contacted the bare, uninsulated connection points, the miner could be fatally shocked. Tr. 52. Moreover, according to Jewell, because the welder was located outside the shop, miners who regularly pass it while it was in use could trip and contact the exposed connection points. *Id.* Jewell knew that the welder had been used for repair work recently, and he believed that it would be used again as mining continued. Tr. 24. Therefore, he found that it was reasonably likely a miner would touch one of the connection points and be killed.³ Tr. 23.

Jewell also found that the exposed connection points were the result of high negligence on the company's part. Gov't Ex. 4. He testified that the foreman's office was within 10 to 12 feet of the welding machine. Tr. 24. Jewell testified the foreman said he "was aware of [the bare connection points, but that he] had just not gotten to fix it." *Id.* The condition was corrected by insulating the connection points with non-conductive tape. Tr. 24-25; Gov't Ex. 5.

Herbert had little to say about the condition, except to maintain that few miners were endangered by it. He noted that Sangravl only had four hourly employees; the crane operator, two truck drivers and the loader operator.⁴ Tr. 64. He also testified that the foreman's office was located on the "other side of the shop," and that it was not adjacent to the welder. *Id.*

³ The welder was powered with 175 amps and 240 volts of electricity, more than enough to electrocute a person. Tr. 26-27.

⁴ According to Herbert, the crane operator did all of the welding at the facility. Tr. 64.

THE VIOLATION

Section 56.12030 requires the correction of a potentially dangerous condition before equipment is energized. The testimony establishes the violation. Jewell's description of the hazard was not refuted. Nor was his testimony that the welder was used regularly. Tr. 22-23. When in use the person doing the welding was required to stand adjacent to the bare connection points. In addition, when he or another miner activated the welder's on and off switch, his hand came very close to the exposed points. In either case, a slip or misjudgement could cause the miner's hand or other body part to contact the energized connection point or points. The miner could be electrocuted. Jewell's statement that the welder had been used recently was not disputed and there was no indication the insulation was going to be applied before mining continued and the welder was used again.

S&S AND GRAVITY

In addition to proving the violation, the Secretary easily established the other criteria set out in *Mathies*. 6 FMSHRC at 3-4. The violation exposed miners operating the welder or working in close proximity to the exposed connection points to a possibly fatal injury. Jewell's testimony in this regard was not rebutted and it established criteria two and four, leaving only criteria three. Tr. 23, 51-52.

The inspector believed an electrocution was reasonably likely because the welder had been used recently and as mining continued would be used again. Tr. 24. The inspector thought that the frequency of use when combined with the proximity of the exposed connection points to those using the welder meant that as mining continued a miner was likely to slip and fall onto or otherwise inadvertently contact the energized connection points. *Id.* I agree with Jewell that the combination of factors made a very serious accident reasonably likely, and I hold that he was right to find that the violation was S&S.⁵

The violation also was serious. With 175 amps and 240 volts of electricity coursing through the connection points, if a miner contacted the points, a fatality was likely. Tr. 26-27.

⁵ The finding is based solely on miners who used the welder. It is not based on the hazard posed to miners who passed by the welder during the course of the work day. While Jewell established that miners in fact passed the welder (Tr. 53), he did not testify as to how likely it was that the miners would trip or stumble and come in contact with the connection points. The record reveals nothing about the condition of the floor where miners passed or might pass as mining continued, nor does it reveal anything about the distance between where they might trip or stumble and the exposed connection points. Without evidence on these matters it is not possible to determine the likelihood of injury to passing miners.

NEGLIGENCE

Jewell found that the violation was the result of Sangravl's high negligence, and I agree. Tr. 24; Gov't Ex. 4. Jewell testified the foreman stated he knew of the violation but "had just not gotten to fix it." Tr. 24. Herbert did not dispute Jewell's testimony. The high degree of danger posed by the violation meant that mine management was under a commensurately high degree of care to make sure the connection points were insulated. It was a duty management did not meet.

CITATION NO.

7752047

DATE

6/23/08

30 C.F.R. §

56.12004

The citation states in part:

The 120 volt orange power cable laying on the concrete floor of the shop is . . . in a defective condition. The inner conductors of the energized power cable are not protected against mechanical damage, in that the insulation is broken in two spots. The inner conductors are exposed in each spot for an area of approximately one inch. In one of the damaged spots the inner conductors are bare. This condition created an electrical shock/burn hazard.

Gov't Ex. 6.

On June 23 Jewell entered the mine's shop where he saw a 120 volt cable lying on the floor. Tr. 28. The cable was adjacent to a walkway. *Id.* Jewell testified that he saw two different openings in the cable's jacket and through each of the openings he saw the cable's exposed inner conductors. *Id.* The hazard created by the condition was that a miner who contacted the inner conductors would be electrocuted. Tr. 28. After he cited the condition as a violation, Jewell took a photograph of one of the openings. Tr. 29; Gov't Ex. 7.

Jewell believed the cited condition was reasonably likely to result in an electrocution. Tr. 29. Because the cable was energized and miners traveled on foot adjacent to the cable's openings, Jewell concluded that a miner was likely to contact the uninsulated conductors as mining continued. Tr. 30, 52. The hazard endangered Sangravl's miners and its contractors, all of whom traveled in and out of the shop. Tr. 31, 53. Jewell stated he was told that the cable was used on an "as needed" basis, meaning it was used as much as once or twice a day or as little as once or twice a week. Tr. 55.

Jewell found the condition was due to the company's moderate negligence. Tr. 31; Gov't

Ex. 6. The open areas in the cable were, he stated, “fairly small.” *Id.* He did not think that the condition was “readily obvious.” *Id.* Nonetheless, he believed that with “a little attention, [the condition] should have been corrected.”⁶ *Id.*

THE VIOLATION

Section 56.12004 requires in pertinent part that “[e]lectrical conductors exposed to mechanical damage shall be protected.” The violation existed as charged. It is clear from the testimony that the cable was damaged and that the conductors inside the cable were exposed. Tr. 28. In fact, they were exposed in two places. *Id.* Because the cable was open in two places, the conductors were not protected. I infer from the openings in the cable that the conductors were subjected to mechanical damage when the openings were made, and there is no evidence in the record to indicate otherwise. Moreover, I accept Jewell’s testimony that miners traveled on foot adjacent to the openings, and that the cable was used at the most once or twice a day and at the least once or twice a week. Tr. 30, 53, 54-55. If a miner slipped and fell onto or against the cable, the conductors would be subject to further damage. Tr. 30, 52; *See Owyhee Calcium Products, Inc.*, 21 FMSHRC 779, 781-782 (July 1999) (ALJ Cetti). In addition, ongoing use of the cable subjected the unprotected conductors to damage.

S&S AND GRAVITY

In addition to proving the violation, the Secretary established the other criteria set out in *Mathies*. 6 FMSHRC at 3-4. Jewell feared that the violation exposed miners traveling by the cable to the danger of slipping and contacting the exposed conductors. Tr. 30. He also testified that the cable was used on a fairly regular basis. Tr. 55. In fact the cable was energized when he observed the exposed conductors. Although the Secretary did not provide any evidence regarding the likelihood a miner’s slipping, falling and contacting the conductors, Jewell’s unrefuted testimony regarding use of the cable means those who used the cable were in close proximity to the exposed conductors on a regular basis. *Id.* I conclude that as mining continued, one of the miners who used the cable was reasonably likely to touch the exposed conductors and suffer a serious or fatal shock injury.

Jewell believed that with 120 volts of electricity passing through the conductors, the least that would happen if a miner contacted one of the open conductors is that the miner would be severely shocked. Tr. 28, 30. Jewell’s testimony in this regard was not disputed. I accept it and find that the violation was serious.

⁶ The cable was not required to be examined on a regular basis, except as part of the general inspection of the workplace. Tr. 54.

NEGLIGENCE

Jewell found the violation was due to the company's moderate negligence. Tr. 31; Gov't Exh. 6. His finding was based on the fact that the openings in the cable were small. Tr. 31. While the openings should have been detected and repaired, I agree with Jewell that the fact the openings were small and presumably hard to detect meant that the company's lack of care was ordinary.

CITATION NO.
7752049

DATE
6/23/08

30 C.F.R. §
56.14101(a)(2)

The citation states in part:

The parking brake equipped on [a] . . . haul truck [was] not maintained in functional condition. When tested on the maximum grade it travels, with [its] typical load, the parking brake would not hold the truck in place. The truck is being used to haul sand from the barge off [the] loading area to stock piles. The truck travels upon grades and around other mobile equipment. This condition creates a haulage hazard of equipment due to insufficient braking and [of an] employee being struck by moving equipment.

Gov't Ex. 8.

Jewell testified that on June 23 he observed the truck in question traveling on 8 to 10 percent grades at the mine.⁷ He was told that the truck sometimes was parked on the grades. Tr. 32. Some of the grades were approximately 150 feet long. Tr. 33. When Jewell observed the truck on June 23 it was hauling a typical load. Tr. 33. Jewell asked the truck driver to go to one of the steepest grades the truck used, to apply the truck's service brakes, to set the park brake and to slowly let up on the service brakes. *Id.* The driver did as Jewell requested, and as he released the service brakes, the truck began rolling down the grade. *Id.* The truck was owned by Sangravl. Tr. 33, 55-56.

Because the truck at times was parked on grades, Jewell believed the faulty park brake posed a fatal hazard to the truck driver and to others who worked and traveled at the mine. He feared that after the truck driver parked and exited the truck, it would begin to roll endangering the driver. Tr. 34, 56. The rolling truck would also endanger other miners traveling or working on foot in the area. Tr. 56. For example, Jewell testified that the crane operator walked back and

⁷ The truck is depicted in a photograph that Jewell took. Gov't Ex. 9.

forth from his equipment to the shop area and in doing so might passed the truck. *Id.* The foreman too might pass the truck on foot. *Id.* Also, Jewell believed that operators of other equipment using the same road were endangered. Tr. 34. The day he conducted the inspection Jewell saw other vehicles traveling the road. Tr. 35.

Herbert explained that typically the truck was loaded with sand and gravel at the river site hopper and it was then driven up a grade leading to the stockpiles. The product was dumped at a stockpile in the yard at the top of the grade and the truck was driven down the grade. Tr. 66-67. According to Herbert the truck was “not ever” parked on a grade. Tr. 65. It was usually parked in the yard which was “mostly flat.”⁸ Tr. 67. The only time the truck driver got out of the truck was “if he ha[d] to go or something.” *Id.*

In Jewell’s opinion, an accident was likely as mining continued because the truck driver told Jewell that he had to occasionally park the truck on a grade, get out, and walk around the truck to check conveyor belts or to check the belt feeder controls. An accident was made reasonably likely by the fact that the truck was used frequently. Tr. 36. On the day he found the defective brakes, the truck had already hauled 35 loads of sand. *Id.* Injuries resulting from being hit by the haul truck could, in Jewell’s opinion, be fatal, or at least very serious. Tr. 35.

Jewell found that the company was moderately negligent in allowing the defective park brake to exist. He was told by the truck operator that when the park brake was tested at the start of the shift, it was functioning properly. However, Jewell noted that the morning test did not meet the requirements of the safety standard because the test was conducted when the truck was empty, not when it was bearing its typical load. 30 C.F.R. §56.14101(a)(2); Tr. 37. Nonetheless, in Jewell’s view, testing the brake, albeit incorrectly, mitigated the company’s negligence to some extent. *Id.* In order to return the park brake to functioning condition the haul truck was taken out of service and repaired. Tr. 37-38; Gov’t. Ex. 10.

THE VIOLATION

Section 56.14101(a)(2) requires that parking brakes on self propelled mobile equipment “be capable of holding the [self propelled mobile] equipment with its typical load on the maximum grade it travels.” Jewell described how the cited haul truck was carrying a typical load, was located on one of the steepest grades the truck travels, and how it rolled when the service brakes were released after the park brake was set. Tr. 33. I credit all of Jewell’s testimony in this regard, and I find the violation existed as charged.

⁸ Herbert conceded however that in those instances when the truck was at the shop, there “might be just a little grade . . . not much.” Tr. 66.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other criteria. The hazard to the driver when leaving the truck after parking it on a grade was real, as was the hazard posed to other miners who traveled on foot or in other vehicles in the vicinity of the truck. Tr. 34, 56. With a defective park brake the truck could roll at any time and do so without advanced notice. The driver and other miners would not expect the truck to move. The moving truck would catch them unawares, and place them in danger of being run over or otherwise struck. Although Herbert maintained the truck was “not ever” parked on a grade (Tr. 65), the record does not support him. Herbert also testified that the only time the driver got out of the truck was if he “ha[d] to go or something.” Tr. 67. This makes the issue one of “when,” not “if,” and I find the driver occasionally parked on a grade and left the truck. Moreover, Jewell testified he was told by the driver that he and others occasionally parked on a grade, got out of the truck and checked conveyor belts and feeders. Tr. 36. This testimony established additional situations in which the driver would place himself in danger.

Jewell’s testimony that other mobile equipment shared the road with the haul truck was not refuted. Tr. 35. Thus, in addition to those on foot, the operators of the other equipment were in danger of being injured if their vehicles were hit by the moving haul truck. Because a number of miners were exposed to the hazard and because of the unexpected nature of the danger, I find that in the context of continued mining miners and miner-operated equipment were reasonably likely to be hit by the rolling truck. I further find that the resulting injuries to the haul truck driver and other miners were likely to be serious, even fatal. The violation was S&S.

It also was serious. As I have noted, if the truck driver or other miners were on foot and were struck by the truck as it rolled, a critical injury was probably the least that could be expected. If a vehicle was struck, the driver of the other equipment would likely be seriously injured or killed.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Here, the park brake was tested just hours prior to the inspector finding it defective. Tr. 37. The test was inadequate. The standard requires the brake to hold the truck when carrying its typical load, and as Jewell pointed out, the brake was tested while the truck was empty. *Id.* Still, the fact that the company tested the park brake signaled to Jewell that Sangrahl was cognizant of the need to maintain the brake in functioning condition and mitigates its lack of care to some extent. Tr. 37. I agree with Jewell that the violation was the result of the company’s moderate negligence.

CITATION NO.
7752050

DATE
6/23/08

30 C.F.R. §
56.12008

The citation states in part:

The 120 volt power cable for the . . . battery charger is pulled out of the entrance at the back of the charger. The charger is located on the . . . crane. The charger was used this morning to help jump start the crane. The charger is often used outdoors. The inner conductors of [the] power cable are exposed a length of three inches. A bare spot is observed in one of the conductors. This condition creates an electrical shock/burn hazard.

Gov't. Ex. 11.

Jewell testified that on June 23 he was inspecting the mine's crane when he noticed exposed conductors on a battery charger's power cable. Tr. 39. The charger was located in the crane's engine compartment. Tr. 40, 57. The cable provided power to the charger. Tr. 39. Where the cable entered the metal enclosure surrounding the charger, the insulation of the cable was pulled back exposing the inner conductors. *Id.* In addition, the insulation on one of the cable's inner conductors was worn to the point where the conductor itself was exposed. Tr. 40. Jewell explained that there were three conductors in the cable, two carried electricity and one was neutral. *Id.* The neutral conductor served as a ground for the charger. *Id.* One of the exposed electrical conductors was touching the metal frame of the charger. Tr. 39. Jewell photographed the cable. *Id.*, Gov't Ex. 12. The photograph shows the condition of the cable. Tr. 39-40; Gov't Ex. 12. The charger and the cable were not energized at the time of the inspection. Tr. 42. However, Jewell was told by the crane operator that the charger was used that morning to jump start the crane. Tr. 42, 57. According to Herbert, jump starting the crane was not unusual. Tr. 66. The crane operator did it frequently. Tr. 66. Jewell explained, however, that the problem with the procedure was that it brought the crane operator dangerously close to the exposed conductors. Tr. 58.

Jewell also noted that miners had to go into the engine compartment from time to time to check fuel and oil levels. Tr. 58. Jewell described the compartment as "pretty confined." *Id.* Once in the compartment a miner had to "pass close by" the exposed conductors. *Id.* In addition the control switch for the charger was located on the front of the charger, close to the walkway, and using the control switch also brought a miner close to the exposed conductors. *Id.*

Jewell believed that given the condition of the conductors, it was reasonably likely a miner would be very seriously or fatally shocked. Tr. 44. He noted that as mining continued the charger would be in "[c]ontinued use" and that the totally exposed conductor was as close as two feet away from the charger's control switch. Tr. 42-43. An electrocution was made even more likely

by the fact that it was wet around the crane. *Id.*

According to Jewell the condition of the cable was due to the company's moderate negligence. Tr. 44. He credited the statement of the foreman that the cable had been examined in the morning and that the cable was not then in the condition Jewell observed. Tr. 44.

THE VIOLATION

Section 56.12008 requires in part that "Power wires and cables . . . be insulated adequately where they pass into or out of electrical compartments." The standard is location specific. Jewell explained that the cable entered the metal enclosure of the charger. Tr. 40. In addition, a photograph taken by Jewell shows the metal enclosure and the cable where it enters the enclosure. Tr. 39-40; Gov't. Ex. 12. The enclosure is an "electrical compartment" within the meaning of the standard, and I conclude that the Secretary has established the location requirement of the standard.

The standard also requires the power cable to "be insulated adequately." Jewell testified without dispute that the insulation on the cable for the battery charger was worn away at the point where the cable entered the metal enclosure. Tr. 40. On one of the three conductors inside the cable, the insulation was completely gone. *Id.*; See Gov't Ex. 12. From this testimony and from the photograph of the cited cable and metal enclosure, I find the Secretary established the power cable was not "insulated adequately" where it passed into the metal enclosure for the battery charger. 30 C.F.R. §56.12008. Therefore, I conclude the violation existed as alleged.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. Jewell testified that the violation created the hazard that a miner would inadvertently touch the uninsulated part of the cable and receive a severe, and perhaps fatal, shock. Tr. 42-44. He also believed it reasonably likely such an accident would occur. Tr. 42. Jewell was right. The battery charger was located in the engine compartment. Although Herbert maintained that using the charger subjected a miner to "hardly any" exposure (Tr. 66), he did not, and I assume he could not, explain how this was so when the evidence established that the charger was used on a frequent basis to start the crane (Tr. 66) and when using the charger and its control switch brought a miner close to the exposed conductors. Tr. 42-43, See Tr. 58. Use of the charger and the proximity of those using it to the exposed energized conductors meant that as mining continued it was reasonably likely a miner would slip and touch the exposed conductors or would otherwise contact them. Obviously, the fact that the conductors were not adequately insulated meant that the violation contributed significantly to the likelihood the miner would be severely shocked or electrocuted. The violation was S&S.

It also was serious. Had a miner contacted the exposed conductors when the charger was energized the miner would have been seriously injured or killed.

NEGLIGENCE

Jewell found that the violation was due to the company's moderate negligence. I will not second guess the inspector for crediting the company's assertion that the lack of insulation was of recent origin (Tr. 44), and like the inspector, I find the Sangravl's negligence was moderate.

CITATION NO.
7752051

DATE
6/24/08

30 C.F.R. §
56.14206(b)

The citation states in part:

The bed of . . . [a] haul truck is raised to the maximum position and not secured against movement. The truck is parked outside the shop area and left [un]attended. An independent contractor was on site to repair the braking system, however [the contractor] has left temporarily to go after parts. The mine operator failed to assure that safe work practices were followed and the bed of the truck was blocked against movement. This condition creates a hazard of an employee being mashed by the . . . movement of the . . . [truck's bed].

Gov't. Ex. 13.

Jewell's inspection continued on June 24. During the inspection he noticed a haul truck with its bed raised. The truck was located behind the shop area. An employee of one of Sangravl's contractors had been repairing the truck. Tr. 46. The employee went for needed parts, and he left the bed raised. *Id.* The bed was not blocked against motion. Tr. 47. Nothing was in place (neither blocks nor pins) to keep the bed from moving unexpectedly. Tr. 45, 59. The truck and its raised bed are clearly shown in a photograph that Jewell took. Gov't Ex. 14. The person Jewell thought most likely to be injured was the employee who had gone for parts and who was expected to resume work. Tr. 47, 60-61. Jewell did not see the employee working, but he was told the employee had been performing maintenance on the truck with the bed raised. Tr. 60-61. Jewell also feared that because of the location of the truck in the shop area, an area where miners frequently traveled, "if someone [got] up [on the truck] and a hydraulic line [broke] or any air movement of the truck or whatever could cause a very serious accident." Tr. 47; *see also* Tr. 59.

Because Sangravl's foreman was "on site," Jewell thought the condition was the result of the company's high negligence. Tr. 47. He noted that the foreman's office was on the side of the shop where the truck was located. Tr. 47-48.

THE VIOLATION

Section 56.14206(b) requires in part that “When mobile equipment is unattended or not in use . . . moveable parts . . . shall be mechanically secured or positioned to prevent movement which would create a hazard to persons.” Jewell’s testimony established the violation. Certainly, the haul truck was “mobile equipment.” When the employee left it to go for parts (Tr. 46), the truck was “unattended.” The truck’s bed was raised, and to abate the cited condition the bed was lowered. The bed was a “movable part.” Tr. 46; Gov’t Ex. 14. The raised bed was not blocked against motion in that no pins or blocks were in place to keep the bed from moving unexpectedly. Tr. 45, 59. These factors were not disputed.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. The unblocked and raised bed presented a discrete hazard. If the bed moved suddenly and unexpectedly while a miner was working on or under the truck, there was nothing to prevent the bed from hitting the miner, an accident that would cause a serious or fatal injury. I agree with the inspector that such an accident was reasonably likely to occur as mining continued. However, I do not find Jewell’s fear that those traveling by the raised bed would get on or under the truck (Tr. 47) a proper basis for finding an accident was reasonably likely. Jewell did not explain why miners with no business pertaining to the truck would be likely to climb on or under it.

The same is not true of the contractor’s employee who was working on the truck. Jewell was told that the employee was repairing the truck with the bed raised before he left for parts. Tr. 46. The employee did not block the bed to prevent it from moving prior to going for parts, and there is nothing to suggest he would have done so after he returned and continued his labors. All that was necessary for an accident was a failure of the truck’s hydraulic system and/or a broken hydraulic hose. In either event, the truck’s bed would slam down on the mechanic. It is common knowledge that such hydraulic failures occur, and I find in the context of continuing mining it was reasonably likely one would happen causing the unblocked bed to fall on the contractor’s employee. Jewell was right to find the violation was S&S.

The violation also was serious. If the truck bed fell and hit a miner, the miner almost certainly would have been critically injured or killed. Gov’t Ex. 13.

NEGLIGENCE

Jewell testified that the violation was due to the company’s high negligence. The major factors leading to his conclusion was the presence of the mine foreman in his office which was located on the same side of the shop building where Jewell saw and cited the raised and unblocked truck bed. Tr. 47-48.

I do not agree with Jewell. Looking at the same factors, I conclude the company’s

negligence was moderate. There is no testimony the mine foreman actually saw the truck with the raised and unblocked bed. Nor is there any testimony the foreman should have seen the violation. The supervisory responsibility of Sangravl for its contractors was not spelled out in the testimony. This being the case, I find that the record does not support the inspector's high negligence finding, and although the company was negligent, I conclude its failure was moderate.

EVIDENCE REGARDING DOCKET NO. SE 2010-785

Robert Knight is a federal mine inspector who is assigned to MSHA's Franklin, Tennessee field office. Knight has worked for MSHA for the past five years. Before that Knight worked in private industry in several jobs holding positions as a health and safety manager and an environmental engineer at a cement plant. Tr. 70. On February 23, 2010, Knight conducted an inspection of Sangravl's facility during which he issued the section 104(d)(1) citation and order that are the subjects of Docket No. SE 2010-785. 30 U.S.C. § 814(d)(1).

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
8545235	2/23/10	56.9300(a)

The citation states in part:

The approach to the scales and the scale house had drop-offs into a small pond below that had not been bermed off. The drop-off was approximately 12 to 15 feet and had tracks within two feet of the drop-off. There were loader tracks, track hoe tracks, and truck tires tracks in the area. There had been berms in the area but they had been removed approximately three months ago. Management has an office and a presence at the scale house and travels by this hazard multiple times daily. Multiple truck operators are exposed to this hazard daily as they approach the scales. Should trucks over-travel the roadway they would turn over and serious injuries would occur. The foreman did not take any measures to guard miners from the hazard. The foreman engaged in an aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply[.]

Gov't Ex. 15.

Knight testified that on February 23 he saw a haulage road at the mine that lacked a berm

where the road bordered a drop-off. The road was traveled by trucks to reach the scales and scale house. Tr. 73. During normal travel, trucks were usually 10 feet to 15 feet from the edge. Tr. 85. The road is depicted in a photograph that Knight took. Gov't Ex. 16. In the photograph the drop-off and pond are clearly depicted to the left of the road. The scale house and scales are in the upper center of the photograph. Tr. 73; Gov't Exh 16. Government Exhibit 17 is another photograph taken by Knight. It shows the scale house, scales and the road in more detail. The drop-off appears on the far left of the photograph. Herbert has an office in the scale house. Tr. 98.

Knight recalled asking Preston Herbert, John Herbert's son about the depth of the drop-off. According to Knight, Preston Herbert told Knight that it was a 12 to 15 foot drop from the edge of the road to the pond. Tr. 75. Knight also remembered seeing trucks driving along the road during the course of his inspection. *Id.* In addition, he saw the tracks of a front end loader and of a track hoe less than two feet from the edge of the drop-off. Tr. 76.

Knight testified that Preston Herbert told him the berm along the drop-off was removed approximately three months before the inspection. Knight believed without a berm a truck or loader or other type of mobile equipment could over-travel the road and fall to the pond. The truck driver or equipment operator could suffer broken bones as a result, or if the equipment overturned in the pond the driver or operator could drown. Tr. 77-79. Knight felt an accident was reasonably likely because of the length of time the berm had been missing and because different contractors and drivers used the road and therefore many were not familiar with the hazard. Tr. 78. In addition, tracks indicated equipment had actually come within less than two feet of the unguarded drop-off. Tr. 85. Knight stated, "if they continue to operate this way, someone will go over the edge." Tr. 86.

Knight found that the condition was the result of the company's high negligence. The fact that the berm was missing was visually obvious. Knight stated, a person "can't come on the property without seeing . . . that the berm . . . is gone." Tr. 80. He also believed that Preston Herbert knew that the berm was missing. *Id.* Knight testified that he asked Preston Herbert why the berm was removed, and Preston Herbert told him "they had been working . . . on the pond." Tr. 80-81.

In addition to being highly negligent Knight found that the company exhibited "aggravated conduct . . . more than negligence" when it failed to make sure a berm or guardrail was in place along the cited part of the road. Tr. 81. The berm was missing yet the company and its customers continued to use the road. Tr. 81.

Once the citation was issued, the company made sure no one traveled the road until a new berm was installed. Tr. 84. The work was completed the next morning. Tr. 82. The new berm was 3 ½ feet high. It was, said Knight, a "real good" berm. *Id.*

John Herbert disagreed with Knight regarding the length of time the cited part of the road was without a berm. Herbert stated the berm had been removed for "[n]ot more than a month." Tr. 87. Herbert explained that the State of Tennessee required the company periodically to drain and

clean the pond. The berm was eliminated so a track hoe could dig settled sand out of the pond area. Tr. 88. Herbert maintained the company would not replace the berm until the work was completed. Tr. 94. However, Herbert did not know when the track hoe dug out the sand because he “didn’t write that down.” Tr. 91. Therefore, he did not know if the work was completed. The track hoe was not in operation when Knight conducted the inspection. Tr. 93, *see* Tr. 96.

Herbert stated that on any given day 25 to 100 trucks belonging to customers ran across the scale and used the road. Tr. 94. Most were return customers, but some were new to the mine. Tr. 95. Herbert describe the trucks as “barely creep[ing].” Tr. 89. Herbert believed there was “no way” a truck was going to go off of the road and into the pond. *Id.* It had not happened in the 30 years he operated the facility. Tr. 90. Herbert added that the drop from the edge of the road to the pond was eight feet, not 12 to 15 feet. Tr. 89.

THE VIOLATION

Section 56.9300(a) requires that berms or guardrails “be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” The cited area was a road used by trucks. Tr. 73. It also was used occasionally by other mobile equipment, as witnessed by the tracks Knight saw approximately two feet from the edge of the drop-off. Tr. 76. While Knight testified that the drop-off was a minimum of 12 to 15 feet (Tr. 78) and Herbert believed it was not more than eight feet, for the purposes of the standard it does not matter. At either distance a drop-off existed that was of sufficient depth to cause a vehicle to overturn and endanger people in the equipment.

The parties agree the berm was missing along the edge of the road that bordered the drop-off. The exhibits make clear that a guard rail was not installed. Gov’t Ex. 16, Gov’t. Ex. 17. As a result there was nothing between the edge of the road and the drop-off, and I accept Knight’s commonsense testimony that if a truck or other equipment over-traveled the road along the drop-off, the vehicles could have overturned injuring or killing the drivers or operators. Tr. 77-78. For these reasons, I find Sangravl violated section 56.9300(a).

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. The lack of a berm or guardrail presented a discrete safety hazard in that if a truck or other mobile equipment approached the edge of the drop-off, there was nothing to restrain the vehicle from going over the edge and/or nothing to warn the driver or equipment operator before the vehicle went off the road. Berms or guardrails serve as visual and physical reminders of the hazards they guard against. They also serve a protective function, in that they may keep a truck or other vehicle from leaving the road. Without a berm or a guardrail those traveling the cited area of the road had an increased risk of over-traveling the road and falling to the pond below. A fall of either eight feet or 12 to 15 feet was reasonably likely to result in at least a serious injury. Tr. 79. As Knight testified broken bones or drowning could result. *Id.*

Knight also believed that an accident was reasonably likely to occur. Customers' trucks frequently traveled the road. Tr. 75. In fact, Knight saw some using the road during the inspection. *Id.* He testified the trucks came within ten to 15 feet of the unprotected edge. It would not take much for an inattentive driver to "wander" over the edge or to otherwise misjudge the distance between his vehicle and the edge. The fact drivers who were unfamiliar with the road traveled it, made it even more likely an over-travel accident would occur. Tr. 85-86. In the context of continuing mining I conclude that Knight was right and that it was reasonably likely that an accident would happen.

The violation was serious. If a vehicle went off of the road and over the edge the operator of the vehicle was likely to suffer broken bones or be killed. Tr. 78-79.

UNWARRANTABLE FAILURE AND NEGLIGENCE

As noted previously, the citation was issued pursuant to section 104(d)(1) of the Act. Such a citation must be issued if a violation is both S&S and caused by the unwarrantable failure of the operator. I have found that the violation of section 56.9300(a) was S&S. I also find the violation was the result of the company's unwarrantable failure.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSRHC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Emery*, 9 FMSHRC at 2203-2204. Whether conduct is "aggravated" is determined by analyzing the facts and circumstances of each case and identifying whether any aggravating factors exist. Such factors include the length of time the violation existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious and posed a high degree of danger, and the operator's knowledge of the existence of the violation. *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (August, 2006).

The berm was deliberately removed from the area above the drop-off. At the time Knight noted the condition, he was told by Preston Herbert the berm had been missing for approximately three months. Tr. 82. However, John Herbert testified it had been removed "not more than a month" previously. Tr. 87. I credit John Herbert's first hand testimony over the recollected hearsay testified to by Knight.

Herbert explained that the berm was removed so that the process of extracting settled sand from the pond could begin. He stated that the berm would not be replaced until the process was completed. Tr. 87-88. Nonetheless, sand was not being removed from the pond when Knight conducted his inspection (Tr. 93, 96), and it seems clear that truck drivers and equipment operators traveling the road in the cited area had been subject to the hazard for at least one month. No barricades were erected closing off the area, no warning signs were posted, nothing was done by the company to alert drivers and operators of the danger posed by the missing berm.

There is no doubt mine management knew of the violation from its inception, since the company was responsible for having the berm removed. Tr. 87. In addition, I infer from the fact that the missing berm was visually obvious and from the fact that the location the area was close to the scale house and along a main mine haul road that mine management had continuing and repeated reminders the berm was gone. The violation created a dangerous situation for the company's employees and for its customers. Because some of the customers were new to the mine (Tr. 95) and therefore unaware of the danger posed by the missing berm, the hazard was increased. Taken together these factors indicate that the violation was the result of the company's aggravated conduct, and I so find.

Not only was the violation due to unwarrantable failure on the company's part, it was also due to the company's high negligence. Negligence is the failure to exercise the care required by the circumstances. The missing berm was obvious and dangerous. Yet, for at least one month the company did nothing to alleviate the danger. No excuse is apparent in the record for the company's failure.

ORDER NO.
8545236

DATE
2/23/10

30 C.F.R. §
56.11001

The order states in part:

The 2500 gallon diesel storage tank had a fixed ladder that was used to access the top of the storage tank for the purpose of checking the levels within the tank and refilling the tank on a quarterly basis. Miners checking . . . or filling the tank could not access the tank in a safe manner. The tank was accessed by management, and management was aware it was being filled quarterly. Should miners fall from the ladder and hit structures[,] serious injuries would occur. The foreman did not take any measures to guard miners from the hazard. The foreman engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 19.

Knight testified that on February 23 he inspected a 2500 gallon diesel storage tank that was located on mine property. Tr. 99. A ladder was affixed to the side of the tank. *Id.* The ladder stopped short of the top of the tank. *Id.* The tank is set into a rectangular concrete depression

which caught fuel if the tank overflowed or ruptured. Tr. 101; *See* Gov't Ex. 20. Surrounding the depression was low concrete "curbing" that extended upward a foot or so above ground level. *See* Gov't Ex. 20.

Miners checked the amount of fuel in the tank by climbing the ladder and inserting a pole into an opening on top of the tank.⁹ Miners also used the ladder to fill the tank. Tr. 99. They climbed the ladder while carrying a fuel line and then inserted the spout of the line into the opening. *Id.*; *See* Gov't Ex. 20. A work platform with hand rails was not in place at the top of the tank and no handrails were present alongside the ladder. Tr. 104. In Knight's opinion, safe access was not provided to measure the fuel level and to fill the tank. Tr. 99-101, 102-103, *See* Gov't Ex. 21. As Knight explained, "There's nothing to keep a miner from falling." Tr. 104.

The bottom of the ladder was set into the retaining depression. *See* Gov't Ex. 20. To reach the ladder, a miner stood on the concrete "curb" and stepped approximately one foot across the depression. The miner then climbed almost to the top of the ladder and either worked from the ladder or clambered to the top of the tank to do the jobs required. If the miner worked from the ladder he had to stretch across the tank to access the tank top opening. To do this, Knight believed that the miner had to maintain both feet on the ladder, grab the ladder with one hand and use the other hand to check the fuel level or to fill the tank with the fuel line. Tr. 106. Or, the miner had to lift the pole with one hand and hold onto the ladder with the other and stretch to reach the opening. Tr. 106. If the miner climbed on top of the tank to do the jobs, he had to lift the pole to the top and then insert it into the opening or he had to carry the hose with one or both hands and insert the spout into the opening. Tr. 112. Doing either job meant that the miner's hands would be occupied. There was nothing in place to steady the miner if he lost his balance or slipped. Tr. 104.

If a miner fell from the ladder or from the top of the tank, he would drop approximately five to eight feet and land on concrete. Tr. 113. Knight believed that the fall would result in serious injuries with broken bones and/or soft tissue injuries being the most likely result. Tr. 107-108, 113. In Knight's opinion such an accident was reasonably likely. He believed at least once every three months miners accessed the ladder to checked the fuel level and filled the tank. Tr. 109.

Preston Herbert told Knight that he was one of the miners who used the ladder to checked the tank's fuel level. Tr. 106. Preston Herbert was part of miner management and Knight therefore believed the company was highly negligent in allowing the condition to exist. Tr. 109. In addition, Knight noted that Preston Herbert also knew that any miners filling the tank had to do the job from the ladder or the top of the tank. Tr. 109-110. The condition was corrected when a railed platform was installed on top of the tank. Tr. 115. As a result, miners could perform both jobs from a safe area. Tr. 115, Gov't Ex. 23.

Herbert testified that the tank had been in place for approximately 40 years, and that the same oil company had serviced the tank for 30 years. Tr. 116-117. According to Herbert, the

⁹ The pole was approximately eight feet long. Tr. 101, 110, 112; *See* Gov't Ex. 20.

company filled the tank on the average of one time a month depending on the amount of business at the mine. Herbert asserted that in the years the tank had been in place, there never was a problem filling it and checking its fuel level. Tr. 116-117.

Herbert noted that although MSHA had been inspecting the mine since 1979, and as a result had conducted approximately 60 inspections, the agency never had cited a violation with regard to the tank. Tr. 118. This testimony caused the Secretary to recall Jewell. For several years prior to Knight inspecting the mine on February 23, 2010, Jewell had inspected the facility. Tr. 123. Jewell did not remember ever seeing the tank during the inspections he conducted. Tr. 124. He stated that he asked where equipment was fueled and a foreman told him there was a fueling station behind the shop. *Id.* There was an area of the mine MSHA did not inspect because the agency did not believe it came within MSHA's jurisdiction, and Jewell implied the fuel tank could have been in that area. Tr. 125. He also speculated that MSHA could have assumed jurisdiction over the area when ownership of it and other parts of the mine was assumed recently by Sangravl. *Id.*, Tr. 126. This would account for the fact that the alleged violation was not cited until February 2010. However, Herbert testified that nothing changed when the ownership changed. The equipment remained the same and the employees remained the same. Tr. 126-127. Herbert emphasized that the fuel tank always was located directly behind the plant where gravel was processed. The tank was never moved. Tr. 128.

Herbert also testified that miners did not have to go to the top to of the tank to determine its fuel level or to fill it. Tr. 117. He maintained both jobs could be done safely from the ladder. *Id.* Knight disagreed, he thought that while a miner might be able to do the tasks from the top of the ladder, the miner would not be able to do them safely. Tr. 121.

THE VIOLATION

Section 56.11001 requires that safe access "be provided and maintained to all working places." A "working place" is "any place in or about a mine where work is being performed." 30 U.S.C. §56.2. The parties agree that work was performed in the cited area. Miners used the ladder to reach the opening on top of the fuel tank in order to check the fuel level in the tank. Tr. 99. Miners also used the ladder to reach the opening to fill the tank. Tr. 99-101, 109-110. These tasks were "work" within the meaning of the standard. Further, it is clear that this work was performed from either the ladder or the top of the tank. The issue therefore is whether the ladder and tank top provided "safe access" to perform the work.

To provide "safe access," the operator had to ensure the ladder and the top of the tank were "secure from threat of danger, harm or loss." *Western Industrial, Inc.* 25 FMSHRC 449, 452, 453 (August 2003) (*quoting Webster's Third new International Dictionary* 1998 (1993)). They were not. If a miner tried to check the fuel level or fill the tank from the ladder, Knight persuasively explained that the miner could not safely maintain both feet on the ladder, steady himself with one hand, and use the other hand to reach across the tank and check the fuel level or fill the tank. Tr. 106, *See* Tr. 121. If a miner tried to do these tasks from the top of the tank, there was nothing for the miner to hold onto and steady himself. Tr. 104, 106-107; *Compare* Gov't. Exs. 21 and 23. A

slip or loss of balance while working from the ladder or the tank's top was not unlikely. Falling from the ladder or the tank's top meant falling five to eight feet onto the concrete curbing or into the concrete depression. Tr. 111- 113. Surely, such a fall would result in serious injuries.

For these reasons I conclude the company violated the cited standard.

S&S AND GRAVITY

In addition to proving the violation (number one of the four *Mathies* criteria, 6 FMSHRC at 3-4), the Secretary established the other S&S criteria. As noted, the lack of safe access at the top of the ladder and on the top of the tank meant that a slip or loss of balance would likely result in a five to eight foot fall to concrete. Thus, the violation created a measure of danger to safety. In addition, I conclude there was a reasonable likelihood the hazard would occur. By Herbert's own account the tank's ladder or top was accessed much more frequently than Knight was lead to believe. Herbert testified that, on the average, the company refilled the tank one time a month. Tr. 116-117. I credit his testimony, and I infer from this that a miner also checked the fuel level in the tank at least once a month. This means that during the course of a year as mining continued a miner or miners would be exposed to the hazard of falling from the ladder or the top of the tank at least 24 times.

Herbert testified that the condition existed at the mine for many years without an accident occurring. Tr. 139. I do not doubt this is true, but I conclude the lack of an accident speaks more to the company's luck than to whether a fall was likely. Nothing was alongside the ladder or on the top of the tank that a miner could hold when perform the tasks required. A slip or loss of balance and a resulting fall were made reasonably likely by the fact that the miner would have either the measuring pole or fuel hose in one or both hands as he worked. With nothing to steady himself or to grab onto in the event of a slip, falling five to eight feet to the concrete was reasonably likely. Broken bones and/or internal injuries would have been the likely result.

In additional to being S&S, the violation was serious. As I have just found, it was likely a miner would suffer disabling injuries.

UNWARRANTABLE FAILURE AND NEGLIGENCE

While I agree with Knight that the violation of section 56.11001 was S&S, I disagree that it was caused by Sangravl's unwarrantable failure. I recognize that several factors are present that might support an unwarrantable failure finding. For example, the condition was obvious, the condition existed for many years, the violation posed a serious hazard to those accessing the ladder and the tank's top, and management officials clearly knew of the existence of the condition. *See Jim Walter*, 28 FMSHRC at 605.

However, just as Sangravl knew of the condition, I find that MSHA did too. Herbert testified that MSHA inspectors had been coming to the facility since 1979, and that the tank had been in place for about 40 years. Tr. 116-117, 118. While Jewell suggested in his testimony that

the area of the mine containing the subject fuel tank might not have been inspected by MSHA until ownership of that part reverted to Sangravl in January 2010, his testimony was too inconclusive to prove MSHA lacked jurisdiction. Tr. 124-125. Herbert, on the other hand, was convincing when he stated that the tank had been in the same place for many years and that although the ownership of part of the mine at one point changed, the equipment and employees remained the same. Tr. 126-127. If the tank came under MSHA's jurisdiction on February 23, 2010, the logical assumption is that it came under the agency purview prior to that time, no matter who "owned" the subject part of the mine. I conclude therefore that for many years MSHA failed to cite the condition. Sangravl was never placed on notice by MSHA that compliance was necessary, and if MSHA's inspectors "missed" the violation over the years it existed, it is understandable Sangravl's management also failed to see that the conditions constituted a violation. Certainly, there was no intentional misconduct on management's part, nor was there purposeful indifference to the safety of its employees and those of its contractors. There was a lack of reasonable care, but the lack of care was ordinary.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

At the close of the hearing the parties agreed that the Secretary could submit a certified copy of the company's applicable history of previous violations, and that the copy would be admitted into evidence. Tr. 131, Gov't Ex. 25. The history submitted by the Secretary shows that the mine had a history of 13 prior violations, all of them cited pursuant to section 104(a) of the Act. *Id.*, 30 U.S.C. §814(a). None of the violations was assessed for more than \$725.00. I conclude from this that the company's history is small.

SIZE

The parties stipulated that Sangravl is a small operator. Tr. 10.

ABILITY TO CONTINUE IN BUSINESS

The burden is on the company to establish that any penalties assessed will affect its ability to continue in business. While John Herbert argued that the proposed penalties are "excessive" (Tr. 139), he did not assert that the penalties assessed will affect the company's ability to continue in business, and I find that they will not.

GOOD FAITH ABATEMENT

All of the violations were abated within the time as set or as extended by the inspector. This constitutes good faith abatement on the company's part.

DOCKET NO. SE 2008-994

CIVIL PENALTY ASSESSMENTS

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752045	6/23/08	56.16006	\$873

I have found that the violation existed, that it was serious, and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$873.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752046	6/23/08	56.12030	\$873

I have found the violation existed, that it was serious and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$873.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752047	6/23/08	56.12004	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752049	6/23/08	56.14101(a)(2)	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752050	6/23/08	56.12008	\$263

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess the Secretary's proposed penalty of \$263.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
7752051	6/24/08	56.14206(b)	\$873

I have found that the violation existed, that it was serious and that the negligence of the

company was moderate. Given these findings and the other civil penalty criteria, I assess a penalty of \$263.

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<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8545235	6/23/08	56.9300(a)	\$11,500

I have found that the violation existed, that it was serious and that the negligence of the company was high. Given these findings and the other civil penalty criteria, I assess a penalty of \$4,000. I have lowered the penalty from that proposed because I conclude \$4,000 more accurately reflects the company's small size and commendable prior history.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8545236	6/23/08	56.11001	\$4,000

I have found that the violation existed, that it was serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria, I assess a penalty of \$873.

ORDER

Within 40 days of the date of this decision, Sangravl **IS ORDERED** to pay civil penalties totaling \$7,671 for the violations found above. In addition, the inspector's negligence finding on Citation No. 7752051 **IS MODIFIED** to "moderate," the inspector's negligence finding in Order No. 8545236 **IS MODIFIED** to "moderate" and the order **IS MODIFIED** to a citation issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a).

Upon payment of the penalties these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

Schean G. Belton, Esq., U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

John B. Herbert, President, Sangravl Company, Inc., 900 Herbert Road, New Johnsonville, TN 37134

/sa